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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1032

RANDOLPH PHILLIPS,
Petitioner,

—against—

JOHN D. MURCHISON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, John D. Murchison, submits this brief in opposition to the Petition for Certiorari of Randolph Phillips.

QUESTION PRESENTED

Respondent submits that this case raises no questions that warrant review by this Court. A brief statement of the proceedings below will demonstrate that the claimed "Constitutional" issues, so indefinitely stated in the Petition, are hallucinatory. Moreover, even if the issues did have substance, they are clearly not ripe for review at this stage of the litigation.

STATEMENT

Petitioner's Four Complaints

On February 24, 1961, petitioner commenced this action by way of an order to show cause why respondent's participation in a proxy contest involving Alleghany Corporation should not be enjoined. The original complaint contained no defamation count, and petitioner admitted that the action was commenced as a gambit in a proxy contest (186a-187a)*. After respondent filed extensive answering papers, petitioner, within a week withdrew his motion and then sought to withdraw his complaint, without prejudice (187a).

The Court below denied Mr. Phillips' effort at voluntary dismissal upon the ground, among others, that he would give no assurance that he would not turn around and start another action and again seek a similar preliminary injunction to halt the proxy contest (187a).

Thereafter, petitioner, as a matter of right, served an amended 53-page complaint (82a-143a) which reiterated the bulk of the original complaint and added a claim of libel against defendant. The action then was dormant for over a year and a half. Respondent then moved to dismiss for failure to prosecute. Petitioner, however, obtained a stay pending the determination of *Alleghany Corporation (Murchison)* v. *Allan P. Kirby, Randolph Phillips, Charles T. Ireland, Jr. and Fred M. Kirby,* 60 Civ. 3511 (188a).

On October 11, 1963, after trial of the Alleghany litigation, respondent moved for summary judgment dismissing the derivative counts of the Amended Complaint and requiring petitioner to plead the one defamation count properly. Judge Dawson granted both branches of the motion on November 1, 1963, stating that the Complaint "is a long, rambling and confused document" (46a).

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*Parenthetical references followed by a lower case "a" refer to the appendices on appeal before the Court of Appeals. References prefixed by "Pet." refer to the Petition and appendices contained in the Petition before this Court.

On November 5, 1963, petitioner repleaded and served a Second Amended Complaint consisting of one count for defamation; his third in this action. It was dismissed on December 5, 1963, for failure to make it a short concise pleading in compliance with Federal Rule 8(e) (46a).

On January 28, 1964, petitioner served an Amended and Supplemental Complaint in his fourth attempt to plead a viable claim for relief. Instead of the one defamation count of his previous complaints there now appeared fourteen counts, not only for defamation but now also for the entirely new claims of abuse of process, malicious prosecution and "conspiracy". Judge Dawson on May 8, 1964, dismissed all counts except 6, 7, 9, 10, 11 and 12, which dealt solely with defamation (46a-56a). In so doing, Judge Dawson sharply criticized petitioner's prolix pleading and unwillingness to state his claim succinctly (46a-48a).

After respondent answered the Amended and Supplemental Complaint as curtailed by Judge Dawson (159a-171a), respondent moved for summary judgment on the remaining six defamation counts. Judge Ryan granted this motion on March 28, 1966, on the ground that the alleged defamations were privileged, under New York law, as fair and true reports of a judicial proceeding. As a result of these two decisions the entire complaint was dismissed and petitioner appealed to the Second Circuit the dismissal as to all counts except counts 4 and 5 (259a).

THE DECISION OF THE SECOND CIRCUIT

The appeal came on to be heard before the Court of Appeals for the Second Circuit on December 15, 1966, (Judges Waterman, Moore and Feinberg). On August 23, 1967, that court unanimously affirmed the dismissal of the complaint as to all counts except those numbered 1, 2 and 12; as to those a majority of the court voted for reversal (Pet. 1a-17a).

The Majority's Rationale in Reversing The Dismissal of Counts 1, 2 and 12

Counts 1 and 2 allege, respectively, a "conspiracy maliciously to use the process of this Court and the New York Supreme Court" and a "conspiracy to maliciously abuse the process" of those courts (5a-11a). Judge Dawson held that under New York law these counts did not state a claim for malicious prosecution or for abuse of process since petitioner had failed to allege either that his person or property had been interfered with in connection with the prior litigation or that special circumstances existed exempting his claim from that rule (Pet. 48a-49a).

Over the strong dissent of Moore, J., the Court of Appeals, reversed the dismissal of counts 1 and 2 relying principally upon the decision of the New York Appellate Division, Second Department, in *Williams* v. *Williams*, 27 A.D. 2d 530 (2d Dep't 1966), a 3-2 decision, which was not decided until after Judges Ryan and Dawson rendered their opinions on the two motions referred to above. The court interpreted *Williams* as upholding ". . . a complaint alleging that an action was instituted 'not with the intention of prosecuting it as a law suit but solely for the purpose of ruining plaintiff's business reputation' . . . despite the absence of any allegation of interference with plaintiff's person or property" (Pet. 4a-8a). It held, therefore, that if *Williams* is affirmed, petitioner's counts 1 and 2 would be properly pleaded.

At this point petitioner's distortion of what actually transpired below should be noted. Throughout his petition, petitioner tries to create the impression that the Second Circuit has deprived him of any remedy including one for malicious prosecution and abuse of process claims. Of course, the Second Circuit did precisely the opposite and petitioner has no complaint insofar as these theories of recovery are concerned and no basis for claiming he has been left without remedy.

Count 12 of the complaint alleges, *inter alia,* that respondent mailed copies of the complaint in an action commenced by him against petitioner directly to certain interested corporate directors in a number of states and Canada and that the allegations therein were "false, malicious and defamatory" (28a).

Judge Ryan held that under the law of New York such publication was privileged. In spite of its sustaining the privilege accorded to respondent's publications to the press (counts 6, 7, 9, 10 and 11) the Court of Appeals held that if *Williams* should be upheld by the New York Court of Appeals, the publication alleged in count 12 might no longer be privileged under New York law.*

None of the issues raised by the reinstatement of counts 1, 2 and 12 are presently before the Court, except that the existence of these counts in the litigation demonstrates that petitioner has not been unconstitutionally deprived of a "remedy", "due process" or the "equal protection of the laws".

The Unanimous Affirmance of the Dismissed Counts

Count 3 of the complaint purports to allege a conspiracy to violate Federal Civil Rule 11 relating to the signing and verification of pleadings. It was dismissed by Judge Dawson because it was not a "recognized tort" (Pet. 52a).**

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*The doubt cast upon the privilege arose from the *Williams* holding that when a law suit is begun solely to defame and with no intention to prosecute, a report of that suit to the press or to the public by way of the press is privileged, but a report directly to the public is not.

**The Enabling Act 28 USC § 2072 directs that the rules, as promulgated by the Supreme Court "shall not abridge, enlarge or modify any substantive right". Hence to read Rule 11 as Petitioner desires would violate the Enabling Act by creating a civil action for breach of a Federal Rule of Civil Procedure. The sanctions set forth in Rule 11 such as dismissal are exclusive and there is no authority to the contrary.

Counts 8 and 13 purport to allege violations of the Securities Exchange Act and certain of its Rules and Regulations. They were dismissed by Judge Dawson because, to the extent petitioner's contentions could be comprehended he had alleged no facts sufficient to show any damage resulting to him personally by reason of the alleged violations (50a).

As to count 14, the Petition states that it "realleges all prior counts as a conspiracy" (Pet. 15). It was dismissed by Judge Dawson as unintelligible and legally insufficient, and it is. Lumping together thirteen previously pleaded claims, eleven of which fail to state a claim for relief and calling the hodgepodge a "conspiracy" adds nothing but confusion.

Counts 6, 7, 9, 10 and 11 each involved publications to the press. As to each, Judge Ryan held that the publications complained of were absolutely privileged under Section 337 of the New York Civil Practice Act (now New York Civil Rights Law § 74) which provides in relevant part:

> "A civil action cannot be maintained against *any* person, firm or corporation for the publication of a fair and true report of *any* judicial proceeding, legislative proceeding, or other official proceeding, or for any heading of the report which is a *fair* and *true* headnote of the statement published" (Emphasis supplied).

As noted in Judge Ryan's opinion, petitioner raised no question of fact in opposition to the summary judgment motion addresed to these allegations. As to each publication involved in these counts, Judge Ryan found that a judicial proceeding was pending at the time of publication and that each of the publications was a fair and true report of those proceedings (Pet. 57a-75a).

The dismissals of these counts presented the following questions to the Second Circuit: Was New York law cor-

rectly applied to the charges of malicious prosecution and abuse of process? Were the alleged libelous publications protected by the New York Statutory privilege? Were the attempts to plead claims for the same damages claimed elsewhere in the complaint by charging conspiracy under Rule 11 and libel under the Securities Exchange Act valid? In affirming these dismissals, no question for this Court was raised.

ARGUMENT

The unique "constitutional" issues conjured up by petitioner are made up of whole cloth. Even if such issues did exist, they are not yet ripe for determination by this Court.

I

THE PETITION FOR A WRIT OF CERTIORARI IS PREMATURE

The vigorousness with which petitioner has attacked the Court of Appeals' affirmance of the dismissed counts bears comparison with the manner in which petitioner has soft-pedaled the Court of Appeals' reversal of counts 1, 2 and 12. Petitioner seeks to create the impression that he has been left without a remedy for the wrongs allegedly done him. Of course, this is simply not so because in the remaining three counts for malicious prosecution, malicious abuse of process and defamation, petitioner seeks to recover the same damages he sought for the same basic wrongs alleged in the dismissed counts.

This point is stressed, not because respondent agrees that the reversal below was correct (respondent position is, of course, to the contrary) but because it bears directly on whether the issues raised in the petition warrant review by the Court at this time. We submit they do not.

If anything is clear from the record below, it is that petitioner is seeking review of a merely interlocutory decree

or order of the Court of Appeals. Because of the viability of counts 1, 2 and 12, there has been no complete or final resolution of petitioner's suit. This Court has often said that the fact a petition seeks to review an interlocutory order or judgment is by itself sufficient ground to deny a writ and that "except in extraordinary circumstances the writ is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258 (1916); *Appalachian Power Company* v. *American Institute of Public Accountants*, 80 Sup. Ct. 16 (Memo, not officially reported, 1959).

On remand from the Court of Appeals, if petitioner is successful on any one of the remaining counts, there will be nothing for this Court to review. If, however, he does not succeed at trial, after appeal to the Second Circuit he will be free to re-petition this Court for a writ of certiorari seeking review of the interlocutory as well as the final decree of the court below. Denial of a writ now, will not deprive him of that right in the future. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co., supra.*

Hamilton-Brown is strikingly similar to the instant case. There plaintiff brought an action for trademark infringement and unfair competition. On appeal from a dismissal of the complaint the Court of Appeals affirmed as to the dismissal of the trademark cause of action but reversed the dismissal of the unfair competition count and directed that an injunction be issued and an accounting had. Plaintiff's petition for a writ of certiorari was denied. On remand the district court rejected the master's report on the accounting, which had recommended a substantial judgment for plaintiff, and awarded plaintiff only nominal damages. Plaintiff appealed a second time and the Court of Appeals reversed, directing that the master's report be confirmed. Defendant then petitioned for certiorari, which was granted.

In response to petitioner's contention that this Court could not review the dismissal of the trademark cause of action, which had been affirmed by the Court of Appeals and with respect to which the previous petition for certiorari had been denied, this Court stated:

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings. [Citations omitted]."

See also *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 398, 418 (1923).

It can be seen, therefore, that the present petition for a writ of certiorari is a needless imposition on this Court's time and patently unnecessary in view of the interlocutory nature of the decision below.

Moreover, both Judges Dawson and Ryan recognized the confused state of the present record, created solely by petitioner's unintelligible pleading. In his separate opinion in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 918 (1950), Mr. Justice Frankfurter expressed the desirability of avoiding review where, as here, the record is cloudy and there is a need to have the issues further illuminated. The alleged constitutional issues are so intricately interwoven with petitioner's gross defects in pleading that a herculean effort would be required to recognize and isolate them.

It should also be noted that although the Second Circuit based its reversal as to three counts on *Williams,* it explicitly recognized that its estimate of New York law might prove incorrect in light of further action in that case by New York's highest court.* It, therefore, recommended that trial of those reversed counts should await the outcome of the *Williams* appeal. While it is clear that an affirmance of *Williams* cannot possibly affect the dismissals of the counts which are the subject of the petition, it is not at all clear that a reversal of that case will not supply additional reasons why these dismissals were proper. This, of course, is just a further indication that the issues raised in the petition are not now ripe for meaningful determination by this Court.

II

PETITIONER'S CONSTITUTIONAL ARGUMENTS ARE DEVOID OF MERIT

Like the complaint, petitioner's constitutional arguments are long, repetitive, confused and, therefore, difficult to comprehend or answer intelligently. At best they amount to advocatory self-levitation without even aid of the proverbial boot straps. To the extent that petitioner's arguments are comprehensible, we now attempt to answer them.

While there is considerable overlapping in petitioner's Questions Presented, they can be generally broken down into four categories namely, that petitioner (a) has been subjected to "unequal 'due process of law' "; (Question 1); (b) that the right to free speech is somehow involved (Question 2); (c) that petitioner has been "unconstitutionally" deprived of a remedy for "an injury recognized by the law" (Questions 4 through 7 and 10); and (d) that he has been deprived of a private right of action for libel

*The appeal in *Williams* is still pending.

under the Securities Exchange Act of 1934 (Questions 3, 8 and 9).

A. The Due Process and Equal Protection Claims.

The privilege granted to a fair and true report of a judicial proceeding has been recognized by this Court as designed to foster communication by and to the press and the public at large; it is almost universally recognized. See, *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 151-152 (1957). Additionally, the privilege promotes free access to courts as a method of settling grievances by restricting opportunity for recriminatory legal action by a defendant as exemplified by the present litigation.

Petitioner's first Question Presented and his subsequent argument (Pet. 2, 24-39), contends that the scope of the privilege to fairly and truly report a judicial proceeding varies among the states and that it is broader in New York than in other jurisdictions (Pet. 24). From this premise petitioner reasons that the protection of law afforded him is unequal, since if he were in a different jurisdiction or if another state's law applied, some of his defamation counts might not have been dismissed (Pet. 25-28).

These arguments are so patently deficient that no extensive answer is required. The Fourteenth Amendment has never been held to guarantee uniformity of decisions among the states. See, *Sarelas* v. *Sheehan,* 326 F. 2d 490; cert. den. 377 U. S. 932 (1964). Under what circumstances a party may recover on theories of defamation is a matter in which the state is recognized as master, *American Wells Work Co.* v. *Layne & Bowler Co.,* 241 U. S. 257, 260 (1916); unless, of course, the state's law infringes upon the federal constitution's guarantee of freedom of speech—an issue which is certainly not raised by a statute which enlarges that freedom!

The mere fact that tort law and the remedies available for given acts vary from state to state does not by itself, give rise to a constitutional issue. *Missouri* v. *Lewis,* 101 U. S. 22 (1880). See also *Salsburg* v. *Maryland,* 346 U. S. 545 (1954).

Petitioner has not been subjected to any discriminatory application of, or variance in, the law. His sole complaint is that the lower courts' interpretation of New York law deprives him of certain alternative theories of liability for the alleged defamation. But this court has invariably recognized the expertise of the District and Circuit Courts on matters of local law—particularly where, as here, all judges were unanimous on the issues claimed to have been erroneously decided and none recognized the state law as raising a constitutional issue. See, *Appalachian Power Company* v. *American Institute of Public Accountants,* 80 Sup. Ct. 16 (Memo not officially reported; 1959).

B. The claim as to Freedom of Speech.

The second Question presented best illustrates the nature of petitioner's constitutional arguments. The Question talks of freedom of speech, but it is clear that all that is involved here is a statute which has *protected* the freedom of speech of its citizens. Hence, petitioner cannot claim that his freedom of speech has been jeopardized or is in issue (and he makes no such claim). Indeed, he cannot even claim that freedom of speech of respondent (which his suit attempts to limit) has been restricted by the decision below. In short, he cannot claim that the decision petitioned from raises an issue concerning the Constitutional protection of free speech.

C. Deprivation of a Remedy Claim.

It is difficult to categorize Questions 4 through 7 and 10. Like Questions 1 and 2, they are peppered with "due proc-

ess" and "constitutional protection" phrases and appear to be premised on this Court's holdings in *Time, Inc.* v. *Hill,* 385 U. S. 374 (1966); *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966); *Linn* v. *United Plant Guard Workers,* 383 U. S. 53 (1966); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964) and *Pennekamp* v. *Florida,* 328 U. S. 331 (1964).

Petitioner violently objects to the Court of Appeals' failure to deal with these cases in its opinion. This omission is understandable, however, for petitioner's reliance on these cases is totally misplaced.

The central theme of petitioner's contentions seems to be that the New York statute and the lower courts' application of it here, deprived him of some constitutionally guaranteed remedy for defamation. But these cases stand for the converse proposition, for in each of them this Court, acting in accordance with constitutional imperatives, actually restricted the remedies or damages that might otherwise be available to a litigant under state law.

In *Linn* this Court, in holding that the National Labor Relations Board did not have exclusive jurisdiction over a defamation action by an employer against a union, recognized that libel laws varied from state to state (*id.,* pp. 58-59), and consequently *limited* the availability of State remedies and the damages recoverable for libel to those instances where there was a showing of actual malice and damage, so that the States' interest in libel would not interfere with the effective administration of national labor policy which was designed to foster "freedom of speech" in labor disputes.

In *Rosenblatt* as in *Linn,* the Court *limited,* rather than enlarged, the right to recover for libel under state law. The Court specifically restricted the definition of "malice" and "public official" under New Hampshire law so as to make it *more difficult* for plaintiff to defeat the privilege of fair com-

ment under that State's law. In effect, it expanded the concept of freedom of speech and *added* to state law a "privilege" defense that did not previously exist under that State's law.

The quotation in *Rosenblatt* from this Court's decision in *Pennekamp* v. *Florida* (id., p. 84), so heavily relied upon by petitioner here, was actually an expression of this Court's concern that various state laws may infringe on the Constitutional protections afforded free expression, making it necessary for this Court to establish national Constitutionally-oriented guidelines to prevent such infringement.

In *New York Times, Inc.* v. *Sullivan,* the Court held "that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct" (*id.,* p. 283). By no stretch of the imagination could this holding support petitioner's contention that the courts below were under a Constitutional complusion to restrict or do away with the privilege of a true and fair report recognized under New York law.

Finally, *Time, Inc.* v. *Hill,* involved the "right of privacy" provisions of the New York Civil Rights Law (§§ 50 and 51). The Court reversed a decision of the New York Court of Appeals on the ground that its application of the statute to the facts in that case violated the Constitutional protection of freedom of speech and the press.

Petitioner's reliance on the foregoing cases as creating Constitutional issues which require resolution by this Court demonstrates better than anything else how illusory those issues are.

D. The Securities Exchange Act Claims.

As the opinion of Judge Dawson indicates, he encountered great difficulty in ascertaining what petitioner's conten-

tions were with reference to counts 8 and 13. Apparently the gravamen of these counts is that petitioner has been personally deprived of some sort of protection purportedly provided by the Securities and Exchange Act of 1934 and the proxy rules promulgated thereunder. The counts, however, are completely devoid of any hint as to just what personal rights petitioner claims the Act conferred upon him or sought to protect. He makes no allegation and no argument which would bring his own personal interest or any damage he claims to have suffered within the intended scope of the 1934 Act. He does not allege (1) that he had a direct stake in the proxy contest which was prejudiced by the alleged defamatory material, or (2) that his corporate franchise or those of other shareholders were impaired to his personal damage. He simply stated that "Rule X-14-9 . . ., among other features, is an anti-defamation statute". Neither Congress nor any Court has so stated.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petion for a writ of certiorari should be denied.

Respectfully submitted,

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